2012 ETHICS SEMINAR

JUNE 8, 2012

Maricopa County Board of Supervisors Auditorium

Phoenix, Arizona

A PROSECUTOR'S GUIDE TO ETHICAL CONDUCT:
Preparation of Witnesses for Testimony

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Presentation on

A PROSECUTOR'S GUIDE TO ETHICAL CONDUCT: PREPARATION OF WITNESSES FOR TESTIMONY

Lecture by Thomas Kapp and Nicole Keary
Bronx County District Attorney's Office
Bronx, New York
June 2012

Discussion Notes

"You never know how much a man can't remember until he is called as a witness."
- Will Rogers

"The defendant wants to hide the truth because he's generally guilty. The defense attorney's job is to make sure the jury does not arrive at that truth."
-Alan M. Dershowitz

Ask a seasoned trial lawyer and they will tell you that witness preparation is the hardest and most important part of their job. A poorly prepared witness is the greatest liability in any case. Witnesses can be viewed as vulnerability despite the merits of a case. Verdicts often hinge on jurors perceptions of key witnesses. Prosecutors (and witnesses) must be aware, and in control of, what is being communicated to the jurors. Often times you are completely dependent on the credibility of your witnesses. This is a feeling that is often lost when prosecutors become more focused on their arguments. Always remember that your witnesses are your "live exhibits".

Witness testimony is one of the most powerful factors in juror deliberations. People generally form most of their impressions from their assessment of the non-verbal behavior of others whether consciously or subconsciously. Do not think that just telling

your witnesses to "relax, be yourself and just tell the truth" will be enough. This overbroad, sweeping platitude is naïve and will not adequately prepare your witnesses for court. A prosecutor who fails to properly prepare a witness may lose her case. A prosecutor who fails to ethically prepare a witness may lose her reputation and career.

THEME AND THEORY

You've heard it before, and you'll hear it again. What is your theme and theory of the case? You must begin building your case theory and theme as soon as you pick up your case file. Your theme should shape every decision you make in your case, from jury selection through to summations, including how prepare your witnesses for testimony and the order in which you present them to your jury. A trial is a struggle for the hearts and minds of the jurors. Do not go into this battle unarmed. Be prepared.

BELIEVE IN YOUR CASE

If you don't believe in your case, why should your jury? You must communicate to them through your words, action and demeanor that you are committed to your cause and believe you will win. A committed advocate speaks with conviction and persuasiveness. Through proper preparation and presentation, your witnesses will do the same. Both you and your witnesses should arrive in court early and prepared. Appear calm and professional. Do not joke or banter with defense in front of the jurors. From the moment that you both enter the courtroom, you are being watched and judged. Your words and actions should demonstrate to the jurors that you are in command, so you must behave as though everything is under control even when it is not. Never let them see you sweat.

PREPARATION FOR DIRECT EXAMINATION

I. Preparation of the Witness

The lack of adequate preparation remains a prosecutor's greatest stumbling block to success in direct examination. The truth of it is the majority of the problems with prosecution witnesses could have been solved before they even stepped into a courtroom. Face it; there is no "easy fix" to a problem once your witness takes the stand. There are, however, ways you can correct witness deficiencies *before* a witness takes the stand.

A. Where Should the Interview Take Place?

1. If we all worked on the show "Law and Order", we would be able to interview witnesses at the crime scene. Or go to their houses, usually without detectives with guns, and extract some nugget of truth from them that would be the anchor to our case theory. However, time and reality preclude this practice. At a minimum, the prosecutor should visit the crime scene. The interview will either take place in your office or in their home/place of business.

2. In your office, never interview two or more witnesses in each other's presence. Most witnesses want to appear important and credible. Therefore, common sense dictates that if one witness hears another's account of an incident, there may be the temptation to conform one's story to an already related version. The end product will be multiple witnesses giving identical testimony; they'll use the same phrases and descriptions and their individual credibility will be called into question.

3. When you are interviewing critical, hostile or questionable witnesses, you must have a third person present. Odds are if they are hostile in your office, wait until they get on the witness stand, in front of the defendant. Then you'll really see hostile. It stands to reason that a need might arise to impeach that witness. Since you don't want to call yourself to the witness stand, a third party (preferably a detective who will memorialize the interview in a report shortly thereafter), can later be called to impeach the

witness.

B. Explaining the Trial Process to Your Witness

1. Make every attempt to explain to your witness the trial process. If you even understand it yourself. They have to be prepared for unanticipated adjournments and sitting in the hallway or in other courtrooms for hours waiting to testify. This advance warning may help prevent a friendly witness from turning antagonistic between your office interview and the witness stand.

2. Inform your witness of any/all pitfalls that they must avoid. Any evidentiary rulings must be understood by the witness, or irreparable damage can be done to your case. Let the witness know what these rulings are and that they came from the judge.

3. Tell your witness never to "guess". Witnesses generally want to be helpful and they believe every question requires an answer. If they don't know, tell them to say "I don't know". If they don't remember, tell them to say "I don't remember". And so on.

4. Time and distance estimates. If you are going to ask your witness to estimate time or distance during their testimony, do it first in your office or in an empty courtroom. Most people do not have a good assessment of time. When they say a "few minutes" they often mean a "few seconds". Before trial, in your office, demonstrate a specific length of time. The same rationale goes for distances. In an empty courtroom, have them demonstrate the distance they are describing.

C. Non-Verbal Communication

1. General Demeanor. The demeanor of a witness is vital to their credibility. A liar will not be believed solely based upon a good impression, but a credible witness can be destroyed by poor non-verbal communication. Tell your witness that their conduct will be judged inside and outside the courtroom. Just like you, your witness must be aware of his/her surroundings, i.e. the courthouse elevator, waiting on line, getting coffee at the deli next to the courthouse. You never know where a juror might appear.

2. Appearance. Witnesses must be prepared to meet the jury's expectations of how they should dress, speak or behave. Meeting those expectations will enhance a witness's credibility.

3. A witness's effectiveness depends on more than just their testimony. How does your witness appear on first glance? What kind of body language or non-verbal cues are they expressing? What kind of language does your witness use to describe events? Is it strong, decisive language? Or hesitant, questioning language?

D. Paint the Big Picture

1. It is important for your witness to feel like they fit into a larger, more significant picture. Take the time to explain to them the theory of your case. Show them how their testimony fits into that theme.

2. Always allow the witness to give a complete, uninterrupted narrative of their testimony. This serves several purposes. One, it allows the witness to become comfortable relating very uncomfortable events. If you start and stop them every five minutes, they will become nervous and distracted. Second, it allows you to assess the completeness and recall of the event. Third, it allows you to identify potential "holes" that may be exploited on cross-examination.

3. When you identify those "holes" (and you will have them) it will be your job to fill them with your direct examination. Any problems you see during your interviews should be addressed in your office, not in court. Will the witness answer questions about his/her criminal record? Is the witness unsure about times/dates/locations? Believe me; if you put a witness on the stand without closing those holes, a skilled defense attorney will blow right through them, shredding your theory to pieces.

E. Assuaging Fear

1. Have you ever testified? For the few of us who have, we know how terrifying it can be. You must always keep that in mind when speaking to witnesses, both civilian and police. Hopefully, this is your witness's first and only brush with the criminal justice system. The fear of the unknown can be debilitating. It is your job

to try to reduce that level of fear to enable a witness to convey their story to the jurors.

2. You can invite your witness to come to court on a day your trial is not in session. Take them to a courtroom. Sit with them as they watch a portion of an actual trial. I do not recommend doing a "trial run" of actual direct and potential cross. I find that it is confusing and potentially dangerous. The last way you want a witness to appear is rehearsed, and a skilled defense attorney may ask if they were given a "preview of the questions". That never looks good.

3. Finally, always tell the witness that witness preparation is proper practice before trial. They should feel comfortable testifying that they have spoken to you or anyone involved with the case.

F. Exhibits

1. "If it doesn't fit, you must acquit". Have we all learned our lesson about exhibits and demonstrative evidence? All it takes is one mistaken marking, one incorrect direction on a map to destroy your theory of prosecution. Anything you intend to show a witness in court MUST be shown to them in your office first. That includes the most seasoned homicide detectives, expert witnesses and lay witnesses. Maps, diagrams, sketches, photos, physical evidence etc. must be reviewed with any/all witnesses you intend to question about it.

II. Ethics of Witness Preparation

An attorney must respect the important distinction between discussing testimony and seeking improperly to influence it – Geders v. United States; 425 U.S. 80 (1976)

A. General Guidelines

ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

a. Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
b. Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;
c. Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
d. Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
e. Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonable believes:
    a. The information sought is not protected from disclosure by any applicable privilege;
    b. The evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and
    c. There is no other feasible alternative to obtain the information;
f. Except for the statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.

Model Code DR 7-102(A)(6)

A lawyer must not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"

Model Code DR 7-109

a) A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.

b) A lawyer shall not advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein.

c) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.

(3) A reasonable fee for the professional service of an expert witness.

Brady Material

The prosecutor must disclose to the defense all *Brady* material. *Brady* material is evidence known to, and under the control of the prosecution, that is favorable to the defendant and material to the issue of guilt or punishment or relating to a witness's credibility. See Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Code of Judicial Conduct or other law.

(g) file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

The ABA Model Rules of Professional Conduct and the Arizona Rules of Professional Conduct provide little guidance in the area of Witness Preparation. Both prohibit lawyers from falsifying evidence or assisting a witness to testify falsely, fraudulently, or perjuriously. Disciplinary Rule (DR) 7-102(A)(6)-(7). Both prohibit lawyers from using false evidence and perjured testimony. DR 7-102(A)(4), (6). But neither gives any advice on how to apply these truisms. The only ethics committee opinion comprehensively applying the Code's general norms to attorney conduct during witness preparation likewise makes "truth" the sole touchstone without providing practical advice.

A lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. In theory, then, the fundamental rule is to "tell the truth". But in practice, defining the ethical limitations of witness preparations in terms of truth can pose a problem. How do you know when your witness's proposed testimony is truthful? What can you do?

B. To Tell the Truth

1. Preparing for the Witness

a) You must review all the evidence so far adduced through witness interviews, paperwork and investigation. You must have a good idea of the evidence before you begin your witness preparation.

2. Remember – You Were Not There

a) No matter how well you master the evidence in a case, you lack personal knowledge about the events at the heart of the witness's testimony. When preparing witnesses, don't just instruct the witness to "tell the truth", emphasize the importance of this rule by explaining the reasons for it.

3. Why Tell the Truth?

a) The law demands it. Before testifying, witnesses take an oath requiring them to tell the truth. Witnesses who intentionally testify contrary to their own beliefs about what is true can be convicted of perjury or obstruction of justice.

b) It's just plain wrong not to.

c) False testimony will be revealed. During cross examination, false testimony dramatically undermines a witness's credibility and can destroy an entire case.

Instructing the witness to tell the truth sets the stage for ethical witness preparation. It helps build rapport with the witness by presenting you as a truth-seeker who will not tolerate anything unlawful or unethical. It also helps establish the dialogue between your witness and you. However, you cannot rely solely on the willingness of a witness to be truthful. To prepare ethically, you still must evaluate the truth of the witness's prospective testimony.

C. Prepping vs. Coaching

Witness preparation is properly done when the attorney is helping the witness communicate the truth. Witness coaching, on the other hand, is perceived as obscuring the truth or instructing the witness to lie. Preparing witnesses helps put them at ease and allows them to understand the parameters of their testimony and the proper procedures. Coaching an unsophisticated witness may make the testimony appear contrived, rehearsed, and unreliable. So the question is…when does witness prep cross the ethical line and become improper witness coaching?

Though certain conduct is obvious such as telling a witness to fabricate testimony, when can assisting a witness with his/her word choice or even his/her demeanor be misleading? What witness interview or testimony preparation techniques can improperly coerce a witness into changing his recollection or view of the facts?

Besides facing disciplinary proceedings for violating the ethical rules, an attorney can be prosecuted criminally for suborning perjury, that is, inducing a witness to testify falsely under oath about a material matter.

A lawyer clearly crosses the ethical line when he offers testimony that he knows, or based on the circumstances should know, is untrue. Covertly encouraging a witness to lie under oath can result in disciplinary proceedings and criminal prosecution just as if the lawyer had done so explicitly.

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

In Re Shannon, 876 P.2d 548 (Ariz. Sup. Ct. 1994)

D. Prepping vs. Coaching – Practical Examples

1. Reviewing Paperwork

Reviewing paperwork or prior testimony with the witness to see how it effects the witness' recollection can be valuable, but it cannot be done in such a way that suggests to the witness that the witness should conform his testimony to what he has read so that the defense hears a consistent story.

2. Discussing Law

During preparation, you may feel a witness will benefit from a brief discussion of the applicable legal principles so that they will have a better understanding of the bigger picture in which their testimony fits. However, beginning an interview with "let me tell you what the law is" can lead the prosecutor into dangerous territory, if by the way the prosecutor relates the law he has reason to know the result of the "legal lecture" will be a change in the witness' testimony to fit the law.

3. Improving Witness Phrasing

Especially when dealing with novice witnesses, a prosecutor may attempt to suggest to a witness different ways answers may be phrased or ways to improve a witness' demeanor. This may be fine, as long as it doesn't lead to false or misleading testimony.

For example, if a witness has a habit of beginning each sentence with a modifier, i.e. "I assume" or "I believe", suggesting that the witness just say what he remembers may be acceptable. Suggesting that a witness avoid slang or offensive language unless relevant may also be permissible.

On the other hand, suggesting that a witness use language that may alter the substance or meaning of a witness' testimony would not be permissible.

4. Refreshing Recollection

Excessive use of leading or suggestive questions during an interview may cause the witness to alter his/her memory. A safer bet is to begin interviews with open-ended questions, following up with specific questions to clarify answers.

Carefully discussing gaps in a witness' memory or any inconsistencies is fine, but must be done without suggesting a response. The goal should be to refresh, but not direct, the witness' testimony.

E. Prepping vs. Coaching – Case Examples

1. Putting Your Words in the Witness's Mouth Intentionally

In the Matter of Eldridge, 82 N.Y.161 (1880)
The attorneys "duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."

2. Putting Your Words in the Witness's Mouth Unintentionally

Idaho v. Wright, 497 U.S. 805 (1990)

3. Advising a Witness to Conceal or Not to Volunteer Information

Alcorta v. Texas, 355 U.S. 28 (1957)

In Re Peasley, 208 Ariz. 27 (2004)

4. Filling Memory Gaps and Eliminating Discrepancies

Kyles v. Whitley, 514 U.S. 419 (1995)

Strickler v. Green, 527 U.S. 263 (1999)

III. Dealing With Your Witness's Unexpected Testimony

A. General Guidelines

ER 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse

Model Code DR 7-102(A)(4)

A lawyer must not "knowingly use perjured testimony or false evidence"

Napue v. Illinois, 360 U.S. 264 (1959)

B. False Testimony Based on Facts Known to Defense

Jenkins v. Artuz, 294 F.3d 284 (2d Cir.2002)

United States v. Helmsley, 985 F.2d 1202 (2d Cir. 1993)

C. Technical Truths

Su v. Filion, 335 F.3d 119 (2d Cir. 2003)